

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

SIDNEY ROSENBERG TRUST
DATED 4/26/2011, AS AMENDED
BY FIRST AMENDMENT DATED 5/22/2012,
BY AND THROUGH ITS TRUSTEE
JERALD KAUFMAN,

Plaintiff/Counter-Defendant,

No. 14-1038-CR

v.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

MARILYN E. HANSES-SHROEGER and
STATE DISCOUNT CORPORATION
d/b/a CAMPUS CORNER II,
jointly and severally,

Defendants-Counter-Plaintiffs.

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At a session of said Court held in the City of Lansing, County
of Ingham, State of Michigan, on: March 15, 2016.

PRESENT: HONORABLE JOYCE DRAGANCHUK
Circuit Judge

This case is before the Court following a bench trial held on January 19, 21, and 25, 2016. The complaint seeks an accounting (Count 1), it requests a receiver and injunctive relief (Count 1), which was previously denied by the Court, it seeks dissolution of State Discount d/b/a Campus Corner II (Count 2), and it alleges breach of fiduciary duties (Count 3), breach of contract (Count 5), unjust enrichment (Count 6), and conversion (Counts 4 and 7). The counter-complaint alleges breach of contract, conversion, and unjust enrichment.

The Court has considered all the testimony and documentary evidence admitted in this case, as well as the briefs and argument submitted by counsel. The Court has

applied the burden of proof by a preponderance of the evidence to the Plaintiff on its claims and to the Defendant on the counterclaims. The Court makes the following findings of fact and conclusions of law.

Sidney Rosenberg and Marilyn Hanes-Shroeger (hereafter referred to as Shroeger) jointly owned State Discount Corporation d/b/a Campus Corner II (hereafter referred to as State Discount) for many years. State Discount is a general merchandise store that sells a variety of merchandise, beer and wine, and MSU licensed merchandise. In 2011, they executed a Stock Purchase Agreement (SPA) that provides, in part, that Shroeger would pay premiums on a life insurance policy on Rosenberg and upon the death of Rosenberg, the proceeds would be used to pay off corporate debt with any remaining funds to be used for operating capital. Upon satisfaction of the terms of the SPA, Shroeger would become the sole owner of State Discount. Rosenberg died on August 19, 2012. This lawsuit arises out of the events following his death and mainly centers around the issue of whether or not Shroeger complied with the terms of the SPA and whether she breached her fiduciary duties to Plaintiff, a 50% shareholder upon the death of Rosenberg.

At one time, Rosenberg owned approximately 26 stores similar to the one State Discount (Campus Corner) store that exists today at 501 E. Grand River Avenue in East Lansing. Rosenberg originally partnered with his father and his son. Over the years, most of the stores were sold and conflict with family members resulted in ownership changes.

Shroeger started working for Rosenberg at his Frandor store as a cashier at age sixteen. She briefly left the state two years later and returned to resume her work for

Rosenberg. After returning, Shroeger's duties transitioned to purchasing and bookkeeping. Over the ensuing years, Shroeger took on more responsibilities, assuming the duties of bookkeeping, hiring interns, and overseeing store operations. In 1991, State Discount Corporation was created and Shroeger became a 50% owner with Rosenberg. There were four stores remaining at that time, including a store in Columbus and a store in Ann Arbor. Today, State Discount (Campus Corner) at 501 E. Grand River is the only store. However, Rosenberg owned a similar but unrelated business in Arizona for many years right up to the time of his death.

In 1998, Shroeger became the President of State Discount. She ran the corporation, made all the decisions, made all the deposits, and paid all the bills. She recorded all money in and money out through use of a computer program. Any financing for the corporation would have been arranged by Rosenberg, without Shroeger's involvement. The corporate tax returns were prepared by Glasser & Associates, with the assistance of Rosenberg. The General Ledger, from which the taxes were prepared, was never prepared by Shroeger.

From time to time Rosenberg would put money into the company when Shroeger could not pay all the bills. However, at some point early on, Rosenberg no longer made monetary contributions to the business. In 2002 and 2003, Shroeger made substantial cash loans to the business, including \$30,000 from an early distribution from her IRA. In 2007, sales dropped off substantially because of the loss of stores. Property taxes came due and Shroeger had insufficient funds to pay them. In 2010, she began getting foreclosure notices. She attempted to pay the taxes with her own checks and credit cards, but remained two years behind. As the business tried to stay afloat in 2000,

Shroeger set up an overdraft line-of-credit with Citizens Bank, using the store inventory as collateral. She continued to put her own money into the company to keep it going right up until the time that Rosenberg died.

As Shroeger shifted to almost complete control over the business, she adopted Rosenberg's rather loose methods of business finance. The company never had any credit cards, so Shroeger used her personal credit cards to make purchases for the company. The company paid the bill and the personal and business expenses were separated each year for tax purposes. The company paid for Rosenberg's and Shroeger's personal vehicles. The company paid the premiums on the life insurance policy for Rosenberg even though the SPA put that obligation on Shroeger.

The company made payments on a Chemical Bank loan of \$198,000 and a Chemical Bank line of credit, both of which are at issue in this case, even though those loans were not in the name of State Discount. Shroeger asked Rosenberg once why State Discount was making payments on a loan in his name, and he explained that he took no salary or draw from the business and he considered it equitable that the business would pay him by paying for his personal loans.

State Discount owned no real estate. Rosenberg owned the building that the business is currently in, and upon his death, the Sidney Rosenberg Trust owns the building. There is another tenant, Footgear, in the building. Footgear operates under a gross lease with taxes included in its rental payments. Even though Rosenberg owned the building and was responsible for the property taxes, the taxes for both tenant businesses were paid from the State Discount account. State Discount's share was 59.5%, leaving Footgear's share at 40.5%. Starting in 2007 when Shroeger was

struggling to pay the taxes for State Discount, she was also paying what she could for the Footgear taxes.

Chemical Bank loans

Plaintiff claims that Shroeger breached the SPA by not using the life insurance policy proceeds as directed in the agreement. The SPA required Shroeger to use the proceeds first to pay off any debt of the corporation and then to invest in operating capital. Specifically, paragraph 5 of the Stock Purchase Agreement provides:

Upon the death of Rosenberg, Shroeger shall promptly take all necessary steps to collect the proceeds of insurance on the Rosenberg's life. Upon collection of the insurance proceeds, Rosenberg hereby directs, and Shroeger hereby agrees, that Shroeger shall apply said proceeds (including not only that portion of the proceeds as shall equal the purchase price for Rosenberg's Stock in the Corporation, but also the balance, if any, of such proceeds) to pay off any and all outstanding debts and liabilities of the Corporation. In the event the insurance proceeds exceed the debts and liabilities of the Corporation, then the excess proceeds from such insurance shall be contributed by Shroeger to the Corporation as additional operating capital. Rosenberg herewith acknowledges that the purchase price for his Stock in the Corporation shall be deemed paid in full if Shroeger fulfills all of her obligations under this Agreement including, without limitation, her obligations under paragraphs 5 and 7.

Paragraph 7 of the SPA provides:

Upon Rosenberg's death, Shroeger shall apply the insurance proceeds to pay and discharge all debts, liabilities and contractual obligations of the Corporation (the "Obligations"), including those the payment or performance of which has been guaranteed by Rosenberg. If the insurance proceeds are insufficient to fully pay the Obligations, the Corporation will use its best efforts to obtain the release or discharge of Rosenberg and his estate from all liability for all such Obligations; and if it is unable to do so, the Corporation shall agree in writing to indemnify and hold harmless Rosenberg and his estate on account of all such Obligations.

First, Plaintiff claims that Schroegeer should have used the life insurance proceeds to pay off the Chemical Bank loan and the Chemical Bank line of credit. The

Chemical Bank loan was obtained January 29, 2010 and was in the amount of \$198,000. The only loan document known to exist regarding the \$198,000 loan is a one-page document entitled "Master Note" (Plaintiff's Ex. 17A). The Master Note shows the loan was made to Sidney Rosenberg personally. The following notation appears at the bottom of the page:

BUSINESS PURPOSE AFFIDAVIT
(individual persons)

The undersigned, in applying for the loan represented by the above promissory note hereby certifies to the Bank that he/she is engaged in the following business: Misc General Merchandise Stores and that the proceeds of the loan will be used in such business for the following purpose and no other: Working Capital.

Shroeger first became aware of this loan when Rosenberg asked her to start making payments on it from the corporate account as his form of compensation. Shroeger paid the Chemical Bank loan from the corporate account right up until May 2014, when she stopped doing so on the advice of counsel. Since then, Plaintiff has been paying the loan.

The issue presented is whether a loan made to Rosenberg personally, although with a stated business purpose, is in fact a debt of the corporation that Shroeger was obligated to pay from the insurance proceeds. Plaintiff says that the debt appeared on the books of the corporation and is therefore a debt of the corporation. The Court disagrees with that analysis.

If contract language is unambiguous, it must be enforced as written. Unambiguous contract terms reflect the parties' intent as a matter of law. The contract terms are given their plain and ordinary meaning. *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292 (2009). On the other hand, a contract is ambiguous when

its provisions are capable of conflicting interpretation. The entire contract must be examined to determine whether it is ambiguous or not. The contract must be construed so as to give effect to every word or phrase as far as practicable. *Klapp v United Ins Group Agency*, 468 Mich 459, 467 (2003).

The Court finds no ambiguity in the SPA. The life insurance proceeds are to be used first to pay the “debts, liabilities, and contractual obligations of the Corporation.” Although the meaning of “debts, liabilities, and contractual obligations” should be apparent, Webster’s New Universal Unabridged Dictionary (1996) defines “debt” as “something owed or that one is bound to pay.” “Liability” is defined as “moneys owed; debts or pecuniary obligations.” “Contractual obligations” is self-explanatory and can be determined as a matter of law.

The plain and ordinary meaning of the words in the SPA is that Shroeger was required to pay the sums of money that State Discount was obligated to pay. The mere fact that the Chemical Bank loan was paid by State Discount in the past or the fact that it is shown on the general ledger of State Discount does not transform it into debts or liabilities of State Discount. State Discount has no obligation to pay the Chemical Bank loan and it never did have an obligation to pay it.

Moreover, the SPA provides that if the insurance proceeds are insufficient to pay all of the debts, liabilities and contractual obligations of the corporation, then Shroeger is to use her best efforts “to obtain the release or discharge of Rosenberg and his estate from all liability for all such Obligations.” This language serves as further support for the conclusion that Shroeger was only obligated to pay debts that State Discount was

legally obligated to pay or there would be no necessity for obtaining a release or discharge from liability.

The Chemical Bank loan is likewise not a contractual obligation of State Discount. The \$198,000 loan from January 2010 is made to Sidney Rosenberg individually. Rosenberg did attest to a business purpose, but Rosenberg owned other general merchandise businesses through the years, including a business in Arizona that he owned right up until his death. There is nothing on the face of the partial loan document to indicate that State Discount was the business for which the loan was made.

Furthermore, Shroeger managed all money into and out of the business and she testified that she never saw an influx of \$198,000 into the business. The Court finds her testimony credible on this topic because she managed all money into and out of the business and was in a position to know whether the loan proceeds went into State Discount. But even if the \$198,000 had gone into State Discount, the loan was made to Sidney Rosenberg individually. As such, it cannot be a contractual obligation of State Discount.

Likewise, the Chemical Bank line-of-credit is not a debt, liability or contractual obligation of State Discount. The only loan document known to exist for the line-of-credit is a document entitled Business Loan Agreement (Plaintiff's Ex. 17B) that consists of pages 1, 2, and 4. There is no signature page. Page one reflects a commercial loan in the amount of \$30,000 being made on December 19, 2011 to Sidney Rosenberg as Borrower at his home address in Bloomfield Hills. The partial document contains the following under "Representations and Warranties":

Business Activities. Borrower maintains an office at 3706 Wabeek Lake Drive W., Bloomfield Hills, MI 48302. Unless Borrower has designated otherwise in writing, the principal office is the office at which Borrower keeps its books and records including the records concerning the Collateral. Borrower will notify Lender prior to any change in the location of Borrower's principal office address or any change in Borrower's name. Borrower shall do all things necessary to comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental or quasi-governmental authority or court applicable to Borrower and Borrower's business activities.

Assumed Business Names. Borrower has filed or recorded all documents or filings required by law relating to all assumed business names used by Borrower. Excluding the name of Borrower, the following is a complete list of all assumed business names under which Borrower does business: None.

For the same reasons stated above with respect to the \$198,000 loan, the line-of-credit is also not a debt, liability, or contractual obligation of State Discount. There is simply nothing in the partial document submitted by Plaintiff that could even remotely lead to the conclusion that State Discount was obligated to pay the line-of-credit. The line-of-credit was extended to Rosenberg personally, under no business name and at his home address. Like the \$198,000 loan, the mere fact that State Discount paid toward the line-of-credit does not transform it into an obligation to be paid from the life insurance proceeds. The unambiguous language of the SPA says otherwise.

Loan from Sidney Rosenberg

Plaintiff also maintains that there was a loan made by Rosenberg to State Discount that should have been paid off from the life insurance proceeds. The only evidence of this alleged loan is that, like the Chemical Bank loans, it appears in the general ledger of State Discount. Unlike the Chemical Bank loans for which there is at least partial documentation, there is no documentary evidence to show that a loan was

actually made by Rosenberg or that it remained outstanding at the time of Rosenberg's death.

Shroeger had almost total control of the business for many years. At some point, Rosenberg moved to the Detroit area. Once he did that, he came to East Lansing two or three days per week and spent one-half the day in a nearby building he owned where he would read the Wall Street Journal. He had no involvement in the day-to-day operations of State Discount. Shroeger had managed all "money in and money out" for many years. When the business struggled, it was her money that went into it to keep it afloat. Rosenberg, when told that Shroeger was loaning the company money, said "you have to do what you have to do." For all practical purposes, he treated the company like it was solely Shroeger's for many years. If Rosenberg had loaned the company \$165,000, Shroeger was in the best position to know about it and she does not. The Court finds her to be credible on this point.

There is simply no evidence beyond what appears on the general ledger to show Rosenberg made a loan to State Discount. The general ledger has no supporting documentation of a loan from Rosenberg. The general ledger has anomalies that cannot be explained. The 2012 general ledger (Ex. 14) shows a loan from Shroeger to State Discount in the amount of \$238,451. Shroeger testified she did not loan this amount to the company. Also, the purported loan from Rosenberg had a declining balance, but Shroeger, the "money in and money out" person, testified that Rosenberg never paid that money to the company and it was not possible he paid and she didn't know about it. She was in the best position to know and she, in fact, was the *only* person in a position to know.

Operating capital

Upon Rosenberg's death, Shroeger became the sole director of the corporation and owed a fiduciary duty to Plaintiff, a 50% shareholder. Plaintiff claims that Shroeger breached her fiduciary duties under section 489 and section 541a of the Business Corporation Act by using corporate funds for her personal use and by using the life insurance proceeds for her personal use.

Section 489 provides for a shareholder action when the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. "Willfully unfair and oppressive" conduct is defined in section 489(3) as follows:

"Willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

Section 541a requires a director to discharge her duties in good faith, as an ordinarily prudent person, and in a manner reasonably believed to be in the best interests of the corporation.

Shroeger's actions have not been shown to be illegal or fraudulent or willfully unfair or oppressive. She conducted business following Rosenberg's death in the manner that she and Rosenberg together had always conducted business. Their cars were paid for from corporate funds, Rosenberg's personal loans were paid from corporate funds, and Shroeger's personal credit cards were used for personal and business expenses. The line was certainly blurred between personal and business finances. Even the SPA was disregarded in some sense because it required Shroeger

to pay the life insurance premiums, but the premiums were paid from corporate funds. Likewise, Rosenberg was obligated to pay Footgear's taxes, but to the extent they were paid, State Discount paid them. Rosenberg ran the business this way – in the words of Shroeger's attorney, "Rosenberg ran the business like it was his own personal piggy bank." He passed on his business practices to Shroeger long ago.

In short, once Shroeger paid the business debts, the balance of the proceeds was to be put toward operating capital. It was, and the business used the operating capital in the same fashion it had always used operating capital. There was nothing done that was shown to be fraudulent or illegal or that interfered with Plaintiff's interests as shareholder.

Plaintiff has not shown that Shroeger did anything in bad faith or that she acted against the best interests of the corporation. In fact, Shroeger has greatly improved the business following Rosenberg's death. The store has been remodeled, inventory has been replenished, and profitability is up. Shroeger no longer has to put her own money into the business because the business is able to sustain itself. She has been good for State Discount.

Plaintiff also claims that Shroeger used the life insurance proceeds for non-corporate purposes in breach of the SPA and in breach of her fiduciary duties of good faith and fair dealing. Plaintiff makes much of the fact that Shroeger prepared four different "versions" of how the insurance proceeds were spent.

The first accounting (Ex. 5, page 3), was prepared by Shroeger in January 2014. In addition to paying back taxes and remodeling the store, it shows that Shroeger made a \$25,000 loan to her son and used \$29,720.69 for "personal use." The second

accounting for the proceeds (Ex. 89) was made sometime after litigation began and it also shows \$25,000 being used as a loan to Shroeger's son. The third accounting (Ex. 5, p 1) shows back pay to Shroeger in the amount of \$36,000 and the \$25,000 loan. The fourth accounting (Ex. W) does not list the \$25,000 loan to Shroeger's son, but it does show loans being partially re-paid to Shroeger from State Discount. The repayment of \$49,000 covered loans from Jan 2003 to May 2011 and the repayment of \$20,632.47 covered loans from June 2011 to May 2012. All remaining amounts went toward taxes, store remodeling, and purchase of inventory. The balance of the insurance proceeds remaining as of December 2014 is shown to be \$15,300.32.

Plaintiff focuses on the first accounting, made before litigation began, and maintains that the money used for a loan to her son and for personal use of Shroeger prove that she breached the SPA and breached her fiduciary duties. The penalty, Plaintiff says, should be that she does not obtain Rosenberg's 50% ownership and the corporation should be dissolved as a consequence.

The Court must make a credibility determination regarding the four accountings Shroeger made for the insurance proceeds. The Court considers the fact that the first one was made before any litigation began. The Court also considers Shroeger's testimony that all the accountings were accurate to the best of her ability. She was not being deceitful with any of the accountings and that she was trying her best to set forth her use of the funds. The Court finds that the testimony of Shroeger is credible, that the differences in the accountings are explainable, and that other evidence supports the accuracy of the fourth accounting.

The fourth accounting (Ex. W) supports the use of the insurance proceeds to pay off the overdraft line-of-credit with Citizens Bank, bring sales taxes and property taxes current, pay for a new website, obtain store remodeling, purchase inventory in 2012, 2013, and 2014, and make partial repayment of loans made from Shroeger to State Discount from 2003 to 2012.

The Citizens Bank line-of-credit was opened by Shroeger in 2000 and is not the same as the Chemical Bank line-of-credit. The Citizens Bank line-of-credit was a legitimate business debt to be paid from the insurance proceeds upon Rosenberg's death. Likewise, the sales and property taxes were properly paid from the proceeds. The website and remodeling expenses were a proper use, leaving only the partial repayment of the Shroeger loans for consideration.

Unlike the purported loan from Rosenberg to State Discount, there is actual documentary support for loans made over the years from Shroeger to State Discount. Exhibit D itemizes the loans made from Shroeger to State Discount. On January 31, 2003, Shroeger took an early distribution from her IRA in the amount of \$30,000 and loaned it to State Discount. This loan is supported by Exhibit E, showing an early distribution from American Funds. Throughout 2011 and during the first half of 2012, Shroeger loaned just under \$40,000 of her personal funds to State Discount. Again, these loans are itemized in Exhibit D, but supported in Exhibit F with copies of checks from Shroeger to State Discount and corresponding deposit transactions in the State Discount bank account. Some of these transactions are designated on the checks or on the deposit slips as "MS loan." All of the loan repayment money that is shown on the fourth accounting is itemized on Exhibit D and supported in Exhibits E and F.

Of course, it cannot be ignored that in the other accountings, Shroeger freely admits using \$25,000 to loan to her son, Nick. But further examination shows that she transferred that amount from the account where she deposited the life insurance proceeds to another account of hers. According to her testimony, she then wrote the \$25,000 check to her son. Plaintiff asked Shroeger if she “washed the money through.” What Shroeger did was of the same effect, but without the nefarious connotation. If State Discount owed money to her for the repayment of a loan (which it did), Shroeger may well have just called the transfer “loan to Nick” when in fact it was repayment of a loan to her and her subsequent loan of that money to her son. That does not constitute a breach of SPA or a breach of any fiduciary duties owed by Shroeger.

Plaintiff’s claims for an accounting, a receiver/injunctive relief, and dissolution are all tied to the claim of breach of fiduciary duty. The Court finds no breach of fiduciary duty and Plaintiff is not entitled to any of this relief. Likewise, the Court finds no misuse of the insurance proceeds by Shroeger and there is no basis for Plaintiff’s conversion claim either.

Counterclaim

Shroeger claims that Plaintiff breached a contract by failing to pay Footgear’s portion of the property taxes from 2003 to 2012. There are multiple faults with that claim, but the most glaring is that there is no contract between these parties that was breached. State Discount operates in the 501 E. Grand River building under a triple net lease (Ex. DD). State Discount is responsible for paying its own property taxes. Footgear operates in its portion of the building under a gross lease (Ex. EE). Therefore, the landlord, who was Rosenberg and is now the Plaintiff Trust, is responsible for

paying Footgear's property taxes. But there is no contract between Shroeger and Plaintiff that would require Plaintiff to pay Footgear's property taxes. Thus, there is no contract between these parties that could be breached.

Shroeger claims that Plaintiff converted "tax monies that belong to [State Discount]." Shroeger provides no law and no more specific argument as to how tax monies were converted by Plaintiff. Without further explanation or authority, the Court considers this issue abandoned.

Shroeger claims unjust enrichment to Plaintiff because Shroeger paid Footgear's property taxes and made payments on the Chemical Bank loan and line-of-credit until May 2014 even though neither of those obligations was the obligation of State Discount. There are two elements needed for an unjust enrichment claim: First, receipt of a benefit, and, second, an inequity resulting from the retention of the benefit. *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59 (2013).

Plaintiff Trust, as landlord, did receive a benefit from Shroeger's payment of Footgear's property taxes. Plaintiff Trust also received a benefit from Shroeger's payment of the Chemical Bank loans when they were not debts of State Discount. However, in neither case does the Court consider the situation one where it would be unjust to allow the benefit to be retained. Shroeger was fully aware that the Footgear taxes were the responsibility of the landlord. She testified knowledgeably that while State Discount operated under a triple net lease, Footgear operated under a gross lease. It can only be concluded that she voluntarily made the payments and the Court cannot find in those circumstances that it would be unjust to allow Plaintiff to retain the benefit of those payments.

The same situation holds true for the payments made on the Chemical Bank loans. Shroeger knew that these loans were not the debt of State Discount. She testified that she asked Rosenberg once why the corporation was making payments on a personal loan of his. He explained that he took no salary and it was a reasonable method of compensating him for the corporation to make the payments on his personal loan. Shroeger testified that she feared the building could have been given as collateral for the loan and she did not want to risk foreclosure. However, Shroeger had the means available to her to determine whether the building was encumbered. While the Court does not fault her for continuing to pay the loans, she cannot now claim that it would be unjust to allow Plaintiff to retain the benefit of those voluntary payments made by her.

For all of the foregoing reasons, the Court finds no cause for action on the Plaintiff's Complaint. Further, the Court finds no cause for action on the Defendant's Counterclaim. Defendant shall submit a final judgment accordingly under MCR 2.602.

/S/

Hon. Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above opinion upon the attorneys of record by placing said Order in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on March 15, 2016.

/S/

Michael G. Lewycky
Law Clerk/Court Officer